THE HON'BLE SRI JUSTICE BILAL NAZKI

AND

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

WRIT PETITION Nos.11848, 11901 and 11908 of 2004

Dated: 17.04.2007

Between:

W.P.No.11848 of 2004
M/s.Southern Asbestos Industries

W.P.No.11901 of 2004
M/s.Sree Balaji Industries

W.P.No.11908 of 2004
M/s.Saritha Industries

..... PETITIONERs

AND

The Customs Excise & Service Tax Appellate Tribunal, South Zonal Bench, FKCCI – WTC, Building, KG Road, Bangalore – 560 009, Karnataka State, rep. by the Registrar and others.

.....RESPONDENTS

The Hon'ble Sri Justice Bilal Nazki
and
The Hon'ble Sri Justice Nooty Ramamohana Rao

Writ Petition Nos.11848, 11901 and 11908 of 2004

Common Order: *(per the Hon'ble Sri Justice Bilal Nazki)*

Since the issue involved in all three Writ Petitions is

one and the same, they are being disposed of by a common order.

These three Writ Petitions are filed by the petitioners-Industries challenging the orders of the Customs Excise & Service Tax Appellate Tribunal, South Zonal Bench of Bangalore, *vide* final order Nos.573 to 575 of 2004, dated 12-03-2004. Before the Tribunal, the orders of the second respondent-Commissioner of Customs and Central Excise in Appeal Nos.11, 12 & 13/2000(H.II)CE, dated 11-04-2000 were challenged by the Revenue.

The brief facts leading to filing of these Writ Petitions may be summarized. The petitioners-Industries are the manufacturers of minerals and pulvarisers and they were also manufacturing and processing Asbestos Fiber. They paid Central Excise duty on Asbestos fiber from the years 1990 till their registration was cancelled pursuant to the judgment of the Supreme Court in *M/s.Hyderbad Industries and others vs. Union of India* vide Civil Appeal Nos.1354 to 1360 of 1980. In the said judgment, the Supreme Court of India held that the process of separation of asbestos fiber from the rock, in which it was embedded by manual or mechanical process, does not amount to manufacture of a new and distinct commodity, and as such, the process could not be assessable to excise duty. After the judgment of the Supreme Court, the petitioners moved applications before the second respondent-Commissioner of Customs

and Central Excise, seeking refund of the duty paid on the ground that this duty has been paid by them although the commodity they were producing was not assessable to any duty. The fourth respondent-Assistant Commissioner considered the said applications and rejected them holding that the petitioners were not parties to the Civil Appeals pending before the Supreme Court in *M/s.Hyderbad Industries and others vs. Union of India* and as such, the said judgment is not applicable to the petitioners' cases. The only contention raised by the petitioners-Industries before the fourth respondent-Assistant Commissioner of Central Excise was that they were the contractors of M/s.A.P.Mineral Development Corporation and M/s.Andhra Asbestos Corporation Ltd. The ultimate finding of the fourth respondent is similar in all the three applications and the finding with respect to the writ petitioner in W.P.No.11848 of 2004 is extracted below:

> 'I have gone through the records of the case and find that M/s.Southern Asbestos Industries are not one of the civil appellants in the Supreme Court in the case of M/s.Hyderabad Industries and others *vs*. Union of India. The judgment pronounced in the case of M/s.Hyderabad Industries and others *vs*. Union of India in Civil Appeal No.1354 to 1360 of 1980 is not applicable to M/s.Southern Asbestos Industries. This view is corroborated by the Supreme Court in case of *Mafatlal Industries vs. Union of India*.'

For the above reasons, the fourth respondent rejected the applications of the petitioners for refund. Petitioners,

thereafter, preferred appeals before the second respondent-Commissioner, who reversed the orders passed by the fourth respondent and held that the petitioners were entitled to refund. The Revenue filed appeals before the first respondent-Tribunal and the first respondent-Tribunal reversed the finding of the second respondent-Commissioner and upheld the view of the fourth respondent-Assistant Commissioner.

Admittedly, the petitioners-Industries were not parties to the litigation before the Supreme Court and they never challenged the orders imposing duty on the manufacture of asbestos by them.

In this factual matrix of the case, this Court is supposed to see the import of the judgment delivered by the constitutional Bench of the Supreme Court in ***Mafatlal Industries vs. Union of India***[1]. In this case, the Supreme Court was considering the situation where assessment between a particular party and the Revenue becomes final and the law is declared by the High Court or Supreme Court that the tax or duty was not assessable, what should be the consequence on those cases in which the assessments had become final. In Para 70 of the said judgment, the Supreme Court held as under:

> 'We may now consider a situation where a manufacturer pays a duty unquestioningly – or he questions the levy but fails before the original authority and keeps quiet. It may also be a case

where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he filed a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case……

One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to

law……..

In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. It is, however, suggested that this result follows only in tax matters because of Article 265. The explanation offered is untenable as demonstrated hereinbefore. As a matter of fact, the situation today is chaotic because of the principles supposedly emerging from Kanhaiyalal and other decisions following it. Every decision of this Court and of the High Courts on a question of law in favour of the assessee is giving rise to a wave of refund claims all over the country in respect of matters, which have become final and are closed long number of years ago. We are not shown that such a thing is happening anywhere else in the world. Article 265 surely could not have been meant to provide for this. We are, therefore, of the clear and considered opinion that *the theory of mistake of law*

and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee.'

Following the principles of law laid down by the constitutional Bench of the Supreme Court in the judgment 1st cited supra, and finding that the petitioners had, at no point of time, challenged the imposition of duty, they are not entitled to any refund and no fault can be attributed to the impugned orders of the Tribunal.

The learned Counsel for the respondents has also pointed out that the Writ Petitions are not maintainable as an appeal is specifically provided against the orders of the Tribunal under Section 35 (g) of the Central Excise Act, 1944.

For these reasons, the Writ Petitions are dismissed. No costs.

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(Bilal Nazki, J)

17th April, 2007

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(Nooty Ramamohana Rao, J)

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[1] **1997(89) E.L.T. 247 (S.C.)**